(2)

No. 94-2122

Supreme Court, U.S.
FILED
JUN 13 1995
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

HARRIS JARREAU,
Petitioner,

V.

IN THE MATTER OF THE COMPLAINT OF PORT ARTHUR TOWING COMPANY ON BEHALF OF THE M/V MISS CAROLYN FOR EXONERATION FROM OR LIMITATION OF LIABILITY,
Respondent,

CONSOLIDATED WITH

IN THE MATTER OF JOHN W. TOWING, INC., AS OWNER AND OPERATOR OF THE M/V JOHN W., PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

WILTON E. BLAND, III, T.A.
Counsel of Record
C. WILLIAM EMORY
HEBERT, MOULEDOUX & BLAND
601 Poydras Street, Ste. 1650
New Orleans, Louisiana 70130
Telephone: 504/525-3333
Attorneys for Respondent

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. When a party voluntarily abandons efforts to have a stay lifted and the matter proceeds to trial, is the party estopped from arguing that the stay should have been lifted.

2. When the aggregate of the damages being sought by all claimants exceed the value of the concursus, is the district court required to lift the stay where less than *all* of the claimants enter into a stipulation that protects the shipowner which has filed a Complaint in federal court seeking to limit its liability?

3. Whether the district court's decision not to lift the stay, which was affirmed by the court of appeals, was correct?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 4

REASONS TO DENY THE WRIT 5

I. THE DISTRICT COURT PROPERLY REFUSED TO LIFT THE STAY 5

II. JARREAU VOLUNTARILY ABANDONED HIS EFFORTS TO HAVE THE STAY LIFTED AND IS NOW ESTOPPED FROM ARGUING THAT THE STAY SHOULD HAVE BEEN LIFTED 10

CONCLUSION 12

APPENDIX A-1

TABLE OF AUTHORITIES

Beal v. Waltz,
309 F.2d 721 (5th Cir. 1962) 9

Complaint of Mucho K. Inc.,
578 F.2d 1156 (5th Cir. 1978) 9

Gorman v. Cerasia,
2 F.3d 519, 525 (3rd Cir. 1993) 8

In Re Complaint of Dammers and Vanderheide,
660 F.Supp. 153 (S.D.N.Y. 1987),
aff'd, 836 F.2d 750 (2nd Cir. 1988) 6, 7

In Re Complaint of Midland Enterprises, Inc.,
886 F.2d 812 (6th Cir. 1989) 5

In Re Two "R" Drilling Co.,
943 F.2d 576, 578 (5th Cir. 1991) 5, 6

Kattelman v. Otis Engineering Corp.,
696 F.Supp. 1111, 1113 (E.D.La. 1988) 5

Limitation of Liability Act,
46 U.S.C. App. §181 5

Luhr Bros., Inc. v. Gagnard,
756 F.Supp. 1264 (W.D.La. 1991) 5, 6

Magnolia Marine Transport Co. v.
LaPlace Towing Corp.,
964 F.2d 1571, 1575 (5th Cir. 1992) 5, 6, 7

ODECO Oil & Gas Co. v. Bonnette,
4 F.3d 401, 405 (5th Cir. 1993) 7, 8

Pershing Auto Rentals, Inc. v. Gaffney,
279 F.2d 546, 549 (5th Cir. 1960) 7, 9

S&E Shipping Corp. v. Chesapeake & O.R. Co.,
678 F.2d 636, 644 (6th Cir. 1982) 7

Treasure Salvors, Inc. v. Unidentified Wreck and Abandoned Sailing Vessel,
640 F.2d 560 (5th Cir. 1981) 9

No. 94-2122

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

HARRIS JARREAU,
Petitioner,

V.

IN THE MATTER OF THE COMPLAINT OF PORT ARTHUR TOWING COMPANY ON BEHALF OF THE M/V MISS CAROLYN FOR EXONERATION FROM OR LIMITATION OF LIABILITY,
Respondent,

CONSOLIDATED WITH

IN THE MATTER OF JOHN W. TOWING, INC., AS OWNER AND OPERATOR OF THE M/V JOHN W., PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

John W. Towing, Inc., respondent, respectfully prays that a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 20, 1995, be denied.

STATEMENT OF THE CASE

While Respondent, John W. Towing, agrees with the majority of Petitioner's rendition of the Statement of the Case, John W. Towing takes this opportunity to correct the following inaccuracies and omissions in Petitioner's Statement.

Subsequent to the June 15, 1991 collision between the M/V MISS CAROLYN and the M/V JOHN W., John W. Towing, in its representative capacity as owner and operator of the M/V JOHN W., filed its Complaint for Exoneration From or Limitation of Liability in the United States District Court for the Western District of Louisiana. Port Arthur Towing Company (hereinafter "PATCO") also filed a Complaint for Exoneration From or Limitation of Liability on behalf of the M/V MISS CAROLYN. These Complaints were consolidated into the present action.

On April 12, 1993, the personal injury plaintiffs, including Petitioner, filed a Motion to Lift Stay. On April 22, 1993, the district court denied the Motion to Lift Stay and specifically found that the Stipulation failed to recognize John W. Towing's claim and that the Stipulation failed to set up a priority sufficient to cover all of the claimants. On May 10, 1993, Petitioner filed a second Motion to Lift Stay. On May 21, 1993, the district court denied the second Motion to Lift Stay.

Thereafter, on June 2, 1993, a telephone conference was held between the court and counsel for the respective parties. As reflected by the district court's June 2, 1993

Minute Entry, during the telephone conference, Petitioner advised the court that Petitioner had abandoned Petitioner's efforts to lift the stay. (Appendix at A-1)

Petitioner has incorrectly advised this Honorable Court that John W. Towing was not willing to enter into a stipulation that would allow for the stay to be lifted. To the contrary, there were several conferences between counsel for the respective parties and the district court judge in order to formulate an appropriate stipulation. Counsel for John W. Towing and counsel for PATCO even traveled to counsel for Petitioner's office in Mandeville, Louisiana for a face-to-face meeting to work out the terms for the stipulation. At this meeting, the parties agreed to acceptable terms for the stipulation; however, when the proposed stipulation was prepared and forwarded, Petitioner failed to incorporate into the Stipulation the terms that had been previously agreed upon.

Contrary to the assertions contained in Petitioner's Statement of the Case, John W. Towing was not only willing to enter into a stipulation, counsel for John W. Towing met with counsel for Petitioner and agreed to the terms of a stipulation that would be acceptable to all concerned. However, for whatever reason, Petitioner either failed to or refused to incorporate the agreed upon terms in any of the proposed Stipulations. Thereafter, on June 2, 1993 Petitioner voluntarily abandoned his efforts to have the stay lifted.

The issues of limitation and liability were tried on June 30, 1993. John W. Towing was exonerated from any

and all liability. On November 8, 1993, PATCO's limitation action and damages were tried. On December 29, 1993, the district court rendered its Judgment, finding that Petitioner had failed to carry his burden of proof and dismissing his claim. Petitioner appealed the district court's final Judgment and on January 18, 1995, the Court of Appeals rendered an opinion affirming the district court. Petitioner then sought a rehearing as well as a rehearing *en banc* which were both denied by the Court of Appeals.

SUMMARY OF THE ARGUMENT

1. The Stipulation proposed by Petitioner failed to include all of the claimants, in particular, John W. Towing. As such, the Stipulation failed to protect PATCO's rights to limit its liabilities by exposing PATCO to a multiple claimant/inadequate fund situation had Petitioner been permitted to pursue his action in state court. Accordingly, the district court's decision to deny Petitioner's Motion to Lift Stay was not only proper, based on the jurisprudence, the district court would have abused its discretion had it lifted its earlier Order staying Petitioner's state court proceeding.

2. Prior to trial, Petitioner advised the district court that Petitioner was voluntarily abandoning his efforts to have the stay lifted. Accordingly, the district court was no longer faced with the question of whether the stay should be lifted and the matter proceeded to trial before the district court. Since Petitioner was no

longer seeking to have the stay lifted, the district court cannot be considered to have committed an error by failing to lift the stay. Petitioner voluntarily abandoned all efforts to have the stay lifted and Petitioner should now be estopped from arguing that the district court erred by not lifting the stay.

REASONS TO DENY THE WRIT

I.

THE DISTRICT COURT PROPERLY REFUSED TO LIFT THE STAY

Respondents, John W. Towing and PATCO, invoked the federal court's exclusive admiralty jurisdiction by filing their limitation of liability actions in federal district court. Courts have repeatedly held that the question of limitation of liability is cognizable only in admiralty. *See, Magnolia Marine Transport Co. v. LaPlace Towing Corp.*, 964 F.2d 1571, 1575 (5th Cir. 1992); *In Re Two "R" Drilling Co.*, 943 F.2d 576, 578 (5th Cir. 1991); *Luhr Bros., Inc. v. Gagnard*, 756 F.Supp. 1264 (W.D.La. 1991); *Kattelman v. Otis Engineering Corp.*, 696 F.Supp. 1111, 1113 (E.D.La. 1988); *In Re Complaint of Midland Enterprises, Inc.*, 886 F.2d 812 (6th Cir. 1989). However, the exclusive federal court jurisdiction which arises from the Limitation of Liability Act, 46 U.S.C. App. §181, *et seq.*, directly conflicts with the right to choose the forum and the right to a jury trial reserved to plaintiffs under the Savings and Suitors clause. Courts addressing this conflict have

consistently recognized that both of these provisions are fundamental to admiralty law. Therefore, federal courts must attempt to reconcile the two statutes whenever possible. *See, In Re Complaint of Dammers and Vanderheide*, 660 F.Supp. 153 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 750 (2nd Cir. 1988); *Luhr Bros., supra.*; *Magnolia Marine Transport, supra; In Re Two "R" Drilling, supra.*

There are two sets of circumstances which courts have consistently found to be exceptions to the exclusive jurisdiction of the federal court. The first situation is where there are multiple claimants and an adequate limitation fund, thereby alleviating the need for a concursus. The second situation is where there is a single claimant who stipulates to the authority of the federal court to resolve the issues relating to the limitation of liability. As stated by the Fifth Circuit in *Magnolia Marine Transport, supra*:

> A claimant who wishes to pursue a state court claim ... must first make certain stipulations in the admiralty court to preserve the shipowner's rights. The claimant must stipulate that the admiralty court reserves exclusive jurisdiction to determine all issues related to the shipowner's right to limit liability, and that no judgment against the shipowner will be asserted to the extent it exceeds the value of a limitation fund.

Magnolia Marine Transport, 964 F.2d at 1575; see also, *In Re Complaint of Dammers and Vanderheide*, 836 F.2d 750, 755 (2nd Cir. 1988).

However, neither of these exceptions expressly provides for the situation presented to the district court in the present case -- multiple claimants and an inadequate fund. It is well settled that in multiple claimant cases, the admiralty court should only allow state court claims to proceed if the proper stipulations are in place. *See, Magnolia Marine Transport*, 964 F.2d at 1576; *In Re Complaint of Dammers and Vanderheide*, 836 F.2d at 755-760. District courts are prevented by law from lifting the stay unless all of the claimants, in addition to the usual stipulations, stipulate to the priority in which all of the claimants are to be satisfied out of the limitation fund. *See, S&E Shipping Corp. v. Chesapeake & O.R. Co.*, 678 F.2d 636, 644 (6th Cir. 1982); *Magnolia Marine Transport*, 964 F.2d at 1576.

In cases involving multiple claimants (as is the case in the present case) all claimants are required to enter into the stipulation before the stay can be lifted. *See, ODECO Oil & Gas Co. v. Bonnette*, 4 F.3d 401, 405 (5th Cir. 1993); *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546, 549 (5th Cir. 1960). However, in the present case it is undisputed that all of the claimants had not entered into the stipulations that were presented to the district court.

On several occasions, Petitioner submitted stipulations and moved the district court to lift the stay. John W. Towing opposed the Motions to Lift Stay on the ground that stipulations submitted by Petitioner failed to take into consideration the fact that John W. Towing was also a claimant in this matter. John W. Towing had a claim against PATCO to recover maintenance and cure paid as a

result of the collision and to recover any sums paid by John W. Towing to its injured crewmembers to settle their personal injury claims.

As a claimant in this matter with valid and legitimate claims against PATCO, John W. Towing stood on equal footing with Petitioner to recover from PATCO all sums paid by way of maintenance and cure and to recover any sums paid by way of settlement. John W. Towing's claim had to be included and properly protected in the stipulations. *See, ODECO Oil & Gas Co.*, 4 F.3d at 405; *Gorman v. Cerasia*, 2 F.3d 519, 525 (3rd Cir. 1993).

John W. Towing was prepared to enter into such a stipulation if and when Petitioner drafted a stipulation that properly considered and protected John W. Towing's claim. In fact, several conferences were held with respective counsel in an attempt to reach such a stipulation. Counsel for John W. Towing and PATCO even travelled to Mandeville, Louisiana, to sit down face to face with counsel for Petitioner in an attempt to reach such a stipulation. At the meeting in Mandeville, the parties agreed to the terms of a proposed stipulation that would be acceptable by all of the claimants. However, following the meeting, the proposed stipulation drafted by Petitioner failed to include the terms that the parties had discussed and agreed to at the meeting.

In spite of the efforts of counsel for John W. Towing and PATCO to arrive at a stipulation that protected John W. Towing and set up a priority for payment out of the limitation fund, the stipulations offered by Petitioner repeatedly failed to properly address these areas.

Based on the fact that the proposed stipulations not only failed to contain the proper protections, but also failed to include all of the claimants, the district court denied the Motions to Lift Stay. Jarreau did not appeal the denials of the Motions to Lift Stay. In *Treasure Salvors, Inc. v. Unidentified Wreck and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981), the Fifth Circuit held that an interlocutory appeal from a denial of a motion to lift stay is proper. In *Treasure Salvors*, the court stated:

> Prior to the unification of the admiralty rules with the federal rules it was generally presumed that the admiralty judge lacked the chancellor's power to order injunctive relief; therefore, the question whether appeals could be taken from such orders in admiralty cases under Section 1292 (a)(1) was seldom posed. This question did, however, arise in the context of injunctions entered in limitation of liability proceedings which barred prosecution of other actions while the limitation action proceeded. We held that such injunctions, and orders modifying them, were appealed while under Section 1292(a)(1).

Id. at 564-565, citing *Complaint of Mucho K. Inc.*, 578 F.2d 1156 (5th Cir. 1978); *Beal v. Waltz*, 309 F.2d 721 (5th Cir. 1962); *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546 (5th Cir. 1960).

Rather than appealing the district court's denial of the Motion to Lift Stay, Jarreau voluntarily agreed to the

jurisdiction of the district court and proceeded forward at trial on the issues of liability, limitation and exoneration, as well as the subsequent trial on damages. As a result, Jarreau has now lost his right to contest this issue on appeal.

Notwithstanding the fact that Jarreau lost his right to contest this issue on appeal, the record clearly shows that the district court was faced with a multiple claimant case and presented with stipulations that failed to include all of the claimants and failed to protect the rights and interests of all the parties involved. Accordingly, the district court denied the Motions to Lift Stay. The Court of Appeal recognized this fact and affirmed the district court's ruling.

II.

JARREAU VOLUNTARILY ABANDONED HIS EFFORTS TO HAVE THE STAY LIFTED AND IS NOW ESTOPPED FROM ARGUING THAT THE STAY SHOULD HAVE BEEN LIFTED

On multiple occasions, Petitioner moved the district court to lift the stay. On no less than two occasions, the district court advised Petitioner as to specific shortcomings of Petitioner's motion. Furthermore, counsel for John W. Towing and PATCO participated in several conferences with counsel for Petitioner (including travelling to Mandeville, Louisiana), in an attempt to reach a stipulation. During this meeting, the specific shortcomings of the proposed stipulations were discussed and various suggests were made to counsel for Petitioner as to how the stipulations could be

drafted to properly account for John W. Towing's claim and provide the proper protection necessary for the district court to lift the stay. In spite of guidance and suggestions made by the district court, counsel for John W. Towing and counsel for PATCO, Petitioner either failed to or refused to prepare a stipulation that was sufficient for the district court to lift the stay.

On June 2, 1993, the district court held a telephone conference with counsel for the respective parties to once again discuss the status of the efforts to arrive at a stipulation sufficient to lift the stay. During this telephone conference, counsel for Petitioner advised the district court that Petitioner had voluntarily abandoned his efforts to arrive at a stipulation, thereby abandoning his attempts to have the stay lifted. At that point, it was agreed that the trial on the issues of limitation and liability would go forward on June 30, 1993. (Appendix A at A-1)

The issues of limitation and liability were tried on June 30, 1993. Damages were tried on November 8, 1993. At no point during either trial did Petitioner reurge the Motion to Lift Stay.

Even assuming for the sake of discussion that the district court should have lifted the stay or that Petitioner did not lose his chance to appeal when he failed to appeal the denial of the Motions (a position that John W. Towing vehemently disputes and that finds no support in either the facts or the law), Petitioner is bound by the fact that he voluntarily abandoned his efforts to have the stay lifted.

Accordingly, Petitioner is now estopped from arguing that the district court erred by not lifting the stay.

It is absurd for Petitioner to now take the position that the district court committed reversible error by failing to lift the stay when in fact Petitioner had advised the district court that he was no longer pursuing his efforts to have the stay lifted. It is abundantly clear that the district court did not commit error and, therefore, the district court must be affirmed on this point.

CONCLUSION

John W. Towing, Inc. respectfully submits that the district court's findings and rulings are fully supported by the record and are clearly not erroneous. The Court of Appeal reviewed this matter and affirmed the district court, specifically finding that the district court did not error in denying Petitioner's Motion to Lift the Stay. Therefore, and based on the foregoing reasons and arguments, it is respectfully submitted that this Honorable Court deny Petitioner's Writ of Certiorari.

Respectfully submitted,

WILTON E. BLAND, III, T.A.
C. WILLIAM EMORY
HEBERT, MOULEDOUX & BLAND
601 Poydras Street, Ste. 1650
New Orleans, Louisiana 70130
Telephone: 504/525-3333
Attorneys for Respondent,
John W. Towing, Inc.

APPENDIX

APPENDIX A-1

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

In the Matter of the Complaint of Port Arthur Towing Company, on behalf of M/V MISS CAROLYN, for Exoneratation From or Limitation of Liability	* * * * * * *	Civil Action No. 91-2591 Judge Trimble Magistrate Judge Wilson

Consolidated With

In the Matter of John W. Towing, Inc., as owner and Operator of the M/V JOHN W., Praying for Exoneration from or Limitation of Liability	* * * * * * *	Civil Action No. 91-2693 Judge Trimble Magistrate Judge Wilson

MINUTE ENTRY

A telephone conference was held on June 2, 1993 in the above-captioned matter with counsel for all parties participating.

The parties informed the undersigned that they have abandoned efforts to agree upon stipulations which would allow the lifting of the stay. Therefore, the Limitation of Liability Action will go forward on June 30, 1993, and the court will try the issues as previously outlined.

With regards to the Motion for Contempt and Sanctions filed by Hunter Lundy against Joshua Tilton for filing an action in Texas, Mr. Lundy informed the court that he would ask his client about withdrawing the contempt charges if Mr. Tilton dismisses the action filed in Texas state court without prejudice. Mr. Tilton agreed to pay Mr. Lundy's expenses for filing this motion if the motion is withdrawn. These parties will notify the court of their decision in this matter.

The undersigned informed the parties that he is willing to allow Commander Cole to testify concerning the applicable navigation rules if Commander Cole is made reasonably available to the defendants for deposition. The defendants are entitled to retain an expert of their own on these issues, and this expert should be made reasonably available to the plaintiffs for deposition.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana this 2d day of June, 1993.

/s/ Alonzo P. Wilson
ALONZO P. WILSON
UNITED STATES MAGISTRATE JUDGE

Copy Sent Date 6-2-93
By: IN
To: Lundy
Bland
DeSonier
Robin
Tilton